Editor's note: 79 I.D. 38

HAROLD C. ROSENBAUM

IBLA 70-563 Decided March 3, 1972

Appeal from decision (Montana 9426 (SD)) of Montana land office, Bureau of Land Management, rejecting color of title application.

Affirmed.

Color or Claim of Title: Generally--Color or Claim of Title: Applications

A quiet title decree by a state court may not be relied upon by an applicant under the Color of Title Act as giving color of title to support a class 1 claim where the holding of the land under the decree falls short of the 20-year statutory period required.

Color or Claim of Title: Generally

The mere payment of property taxes assessed by a county is not sufficient, alone, to constitute a holding of land by the taxpayer under a claim or color of title as required by the Color of Title Act.

Color or Claim of Title: Generally

Under the Color of Title Act the requisite holding of land under some claim or color of title is not satisfied because of changes in the movement of a river affecting the riparian land, where the applicant has no basis for believing he had title to the land derived from some source other than the United States.

APPEARANCES: Frank G. Stickney for appellant.

OPINION BY MRS. THOMPSON

Harold C. Rosenbaum has appealed from a May 4, 1970, decision of the Billings, Montana, land office, Bureau of Land Management, rejecting his application filed June 11, 1968, under the Color of Title Act of December 22, 1928, as amended, 43 U.S.C. § 1068 (1970). 1/

The application was for the E 1/2 SW 1/4, also described as lot 2 and NE 1/4 SW 1/4, sec. 33, T. 90 N., R. 49 W., 5th P.M., Union County, South Dakota, containing 80 acres. In his application, Rosenbaum stated that he has been in open, notorious, and peaceful possession of the land for more than 25 years; that he has paid real property taxes on the property since 1941, when Union County placed the property on its tax rolls; and that in 1958 the Circuit Court for

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1/ The Color of Title Act is hereafter referred to as "The Act."

Union County, South Dakota, awarded him a judgment in a quiet title action. 2/ The application also stated there were estimated improvements worth $2,500, and that 6 acres had been cultivated in 1945, with the cultivation increasing gradually to 80 acres in 1968.

In the processing of his application, the land office sent a letter to Rosenbaum on May 5, 1969, requesting information as to how he acquired the land, and indicating that the mere squatting on public land does not give rights against the United States and that the quiet title judgment did not purport to quiet title as against the United States.

In reply, Rosenbaum's attorney said that Rosenbaum "entered" the property in good faith and commenced paying taxes on it. He asserted that this land was submerged under the Missouri River in the early 1920's and as the river flowed to the south in the 1930's, the land started to be "made back," and he began to pay taxes on it, to clear it, and to make improvements.

On May 28, 1969, the Bureau made a second request to Rosenbaum's attorney of record for information as to the time he entered the land

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2/ A copy of the judgment accompanied the application. The judgment stated the plaintiff had "actual, open and adverse possession" of this property plus the W 1/2 NW 1/4 and NE 1/4 NW 1/4, in the same section, for more than 20 years immediately preceding the commencement of the action. The judgement declared the plaintiff to be the owner in fee simple of the real property and quieted title in him.

and the basis on which he asserts ownership. No reply was made to this inquiry.

The land office then issued its decision of May 4, 1970, stating the requested information had not been filed. The decision held that assertion and ownership by occupancy and use of public domain do not alone qualify an individual under a color of title claim, but that there must be some document purporting to convey title.

Appellant's present attorney asserts that the Bureau's letter of May 28, 1969, was never received by appellant's attorney of record then, and that is the reason the requested information was not submitted. Appellant's first attorney has since become a judge. Because this appeal attempts to supply the requested information and to respond to the Bureau's decision, we need only decide whether the information shows that the requirements of the Act have been met.

For a class 2 claim, the Act and the regulations require payment of taxes for "the period commencing not later than January 1, 1901, to the date of application", 43 U.S.C. § 1068; 43 CFR 2540.0-5(b) (1971). From the appeal it is apparent that a class 2 color of title claim could not be sustained here as the property was not taxed and taxes were not paid prior to 1941 or 1942.

For a class 1 claim, it must be shown that the property has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, that valuable improvements have been made, or that some part of the land has been reduced to cultivation. Id. The action taken below did not question the facts as to improvements or cultivation, but whether possession of the land was based upon a holding under a claim or color of title for more than 20 years.

In this appeal many arguments have been advanced for the proposition that the judgment in the quiet title action brought by appellant constitutes a valid color of title instrument. The difficulty with claiming color of title by virtue of that judgment, however, lies in the fact the judgment was rendered in 1958. In his application, appellant stated he learned he did not have clear title to the land in 1968. Even assuming, therefore, that there was a holding under color of title under the judgment, that 10-year holding falls short of the prescribed statutory 20-year period. Thus, the decree may not be relied on as establishing the requisite claim or color of title.

In explaining his claim to the land prior to the judgment, appellant states that apparently the land had been under water many years ago and after it emerged the county taxed it to him. His attorney indicates in this appeal:

> . . . Mr. Rosenbaum's claimed title did not, as far as I can determine originate from a prior conveyance. It is a question of intent as to why he originally claimed it. The county saying he owned it and taxing him for it was probably the controlling factor, this being exclusive of the South Dakota statute so providing, which was, I imagine, why the county made this determination. Harold Rosenbaum is not the "shrewd Schemer" type. He is easy going and accepts things, and when the county told him it was his, even though there wasn't much usefulness to it at this point, he apparently accepted that as no one else was claiming it. As I understand it, it wasn't very desirable property at that time.
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> It is difficult to say when he "entered upon" the property. It was like an extension of his river bank, made in the 1930s. However, I understand that he began clearing and cultivating it about 1945. I believe he physically entered upon the property as the accretion formed. I would say he probably began exercising domain over it and claimed it when the county said it was his, around 1942, and taxes [sic] him for it, but did nothing with it until 1945. He then reduced the whole thing to cultivation and improved it.

Appellant contends that his occupancy of the land and payment of taxes since 1942, alone, should constitute a valid claim of title. Further, he argues it would be inequitable now for the Government to claim the land after he has changed it from a piece of wasteland of little value into a going farm.

From what has been shown by the applicant, the primary basis for his claiming title to the land, other than the quiet title decree, is because the county taxed him for the land and then he used it.

The fact that the county taxed the land and that appellant paid the taxes does not alone establish a claim or color of title to land within

the meaning of the Act. In Beaver v. United States, 350 F.2d 4, 9 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966), the court expressed doubt that a state's claim of property for taxes could be one characterized as under "color of title", but held that even if it were, the state or other taxing governmental body would have to meet the requirements of the Act, including "actual, exclusive, continuous, open and notorious possession of the parcel" in order to be deemed as holding the parcel under a claim or color of title. Id. at 10. In that case, there had been a tax sale by the governmental body and the claimants were claiming through such a sale. In this case, however, all that has been shown is that the county taxed the property, not that it asserted any claim to the land as owner. It is apparent from the Act itself, that Congress required more than the mere payment of taxes since it prescribed the class 2 type of claim where payment of taxes had to be made from a period beginning from January 1, 1901, to the date of the application. The Act also requires that the land be held in good faith under a claim or color of title. If payment of taxes alone were sufficient, there would have been no reason for Congress to have specified that the land be held under a claim or color of title.

Although this Department has recognized that production of receipted tax bills may constitute corroborative evidence under a class 1 claim to support an assertion that the land has been held in good faith, Ben S. Miller, 55 I.D. 73 (1934), never has the mere

payment of taxes alone been held sufficient to constitute a holding under a claim or color of title.

In Clarence C. and Frank R. Day, A-30454 (March 9, 1966), involving an application to purchase land as a class 2 claim under the Act, the applicants had proved payment of taxes since 1889. On appeal, rejection of the application was affirmed because appellant had failed to show the required color of title since 1901. Appellants could trace the title only through 1927 when one Booth conveyed the title to the applicants' father, a predecessor in interest. Concerning the payment of taxes, in the absence of a document of title, the Assistant Solicitor stated:

> The United States cannot infer that Booth held this land under color of title in absence of an actual document of title, whatever the reason for its absence may be, . . . the mere payment of taxes on this land is insufficient to overcome the absence of such a document.

As this quotation demonstrates, generally it has been held that a document must be offered as evidence to show that the applicant had cause to believe that he had title to the land. See also Nina R. B. Levinson and Clare R. Sigfrid, 1 IBLA 252, 254, 78 I.D. 30, 32 (1971).

Thus, it has been held that mere occupancy of public land and acts of improvement upon the land alone do not constitute a holding of the land under claim or color of title. Thomas Ormachea, A-30092 (May 8, 1964). As stated in Hugh Manning, A-28383 (August 18, 1960):

> . . . [T]he act was never intended to operate as a means of obtaining patent by mere occupation of public land under a pretense of title or claim where the claimant had no good reason to believe he had good title.

Also, a showing only of clearing and cultivating the land is not sufficient. Marion M. Pontius, A-27473 (November 7, 1957). Title to a portion of the public domain cannot be acquired under the Act without the existence of a sound basis for believing that occupation was by right. Id.

The only other basis for a belief that he had a valid claim or color of title to the land, alleged by appellant, pertains to the movement of the river. Although it has been stated that the land in question was submerged by the Missouri River and that it was "made back" or that accretions were added to the river bank, we have no corroborated information of the facts concerning the movement of the river affecting this land and other land owned by appellant. We do not know whether the land in question was ever completely eroded away and covered by water or whether any accretions may have attached to government land or land belonging to the applicant. In any event, such determinations are unnecessary here. If the appellant claims the land by virtue of the doctrines of erosion, accretion or reliction, this would imply that the United States has no title to convey as the

applicant already holds title by operation of law. Therefore, there would be no basis for the United States to convey what it does not have. If the changes in the movement of the river did not under the law affect the ownership of the land, or the United States regained land lost by erosion, then appellant was a mere occupier of public land and would have no basis for believing he had title to the land derived from some source other than the United States. He would thus "lack the basic element of a color of title claim; i.e., possession under some claim or color of title derived from a source other than the United States." Bernard J. and Myrle A. Gaffney, A-30327 (October 28, 1965). 3/ Cf. William F. Trachte, A-30291 (June 8, 1965); Myrtle A. Freer et al., 70 I.D. 145 (1963).

As to the allegation concerning equities, we need only note that this Department's authority to dispose of public land is circumscribed by the acts of Congress and cannot go beyond those bounds. Since it has not been shown that the requirements of the Color of Title Act have been met, the application must be rejected. Id.

3/ A suit for judicial review of the Gaffney decision resulted in a stipulated dismissal without prejudice, January 17, 1969. Bernard J. Gaffney and Myrle A. Gaffney v. Stewart Udall, Civil No. 3-66-22 (D. Minn.).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

Joan B. Thompson, Member

I concur:

Martin Ritvo, Member

I concur in the result:

Frederick Fishman, Member